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In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA AND JUAN MIRANDA,

Appellees,

-v-

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant.

ON APPEAL FROM A SPECIAL THREE JUDGE COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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Dated: November 8, 1973

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JURISDICTIONAL STATEMENT

Appellant, an official of the State of Connecticut, appeals from the judgment of A Special Three Judge Court for the District of Connecticut. This Statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction to consider the appeal, and that substantial questions are presented therein.

OPINION BELOW

The decision appealed from is reported in F. Supp. (1973). A copy of said decision appears in the Appendix, beginning at page 1A.

GROUNDS OF JURISDICTION

Suit was instituted in the United States District Court for the District of Connecticut by Larry Steinberg and Cecil Paskewitz, both residents of Connecticut, against Jack A. Fusari, Labor Commissioner of the State of Connecticut, and Administrator, Unemployment Compensation Act, to determine whether procedures authorized by certain Connecticut statutes violate the "payment when due" provision of the Social Security Act, 42 U.S.C. § 503 (a) (1), and deny plaintiffs' their Fourteenth Amendment right to due process of law. The action was brought pursuant to 42 U.S.C. § 1983.

The District Court allowed two of twelve proposed intervenors to enter the action, but deferred judgment on the request for a determination that this was a class action. A Three Judge Court was convened.

On September 17, 1973, the Three Judge Court rendered a Memorandum of Decision designating this as a class action, and holding that the defendant's procedures failed to meet minimal due process standards and therefor must be enjoined. Said judgment was filed at 11:54 A.M. on September 17, 1973. On October 9, 1973, a Notice of Appeal was filed in the District Court for Connecticut by the defendant.

This appeal is taken pursuant to 28 U.S.C. § 1253, and is supported by the case of *Torres v. N. Y. State Department of Labor*, 33 F. Supp. 341 (S.D.N.Y. 1971).

In that case, a challenge similar to the plaintiffs' in this case was made to New York's practice of terminating unemployment compensation benefits without a prior due process hearing. In a two to one decision, a Three Judge Court rejected both the Fourteenth Amendment claim and the statutory claim. An appeal was taken to the Supreme Court, but because of the intervening decision of the Supreme Court in *Java v. California Department of Human Resources Development*, 402 U.S. 121 (1971), *Torres* was remanded for further consideration in light of *Java*. 402 U.S. 968 (1971). On remand, the Three Judge Court adhered to its former decision. 333 F. Supp. 341 (1971). A new appeal was filed,

and on February 28, 1972, the Supreme Court summarily affirmed, 405 U.S. 949; a Petition for Rehearing was denied on March 5, 1973. 93 S.CT. 1446. No opinion was rendered, although three Justices noted their dissents.

In the instant case, the situation is very similar to that in *Torres*. The defendant therefore respectfully submits that this is a proper appeal pursuant to 28 U.S.C. § 1253.

Statutes Involved

The following federal statutes are set forth in the Appendix, beginning at page 26A:

42 U.S.C. § 503 (a) (1)

The following Connecticut statutes are set forth in the Appendix, beginning at page 26A:

§ 31-235(2)
§ 31-236(1)
§ 31-238
§ 31-241
§ 31-242
§ 31-243
§ 31-274(c)

Questions Presented

1. Whether the defendant's administrative hearing, employing a "seated interview" system, meets minimal due process requirements of the Fourteenth Amendment to the Constitution?

2. Whether the Court, in determining the constitutionality of Connecticut's administrative hearing, erred in receiving and considering evidence relating to the appeal period which followed the hearing in question?

STATEMENT OF THE CASE

On June 9, 1972, Larry Steinberg and Cecil Paskewitz brought this action on behalf of themselves and all persons similarly situated seeking injunctive and declaratory relief on the grounds that certain

Connecticut statutes provide for the termination or suspension of unemployment compensation benefits in violation of the due process clause of the U. S. Constitution and the "when due" provision of the Social Security Act. On November 13, 1972, the District Court allowed two of twelve intervenors to enter the case as plaintiffs.

The class plaintiffs in this case each have been paid benefits for varying periods of time, but then had said benefits terminated after a hearing which plaintiffs claim denied them due process of law and violated the "when due" provision of the Social Security Act. A Three Judge Court for the District of Connecticut, although following the decision in *Torres v. N. Y. State Department of Labor*, 405 U.S. 949 (1972) to the effect that there was no statutory violation of the Social Security Act, distinguished the *Torres* decision on the constitutional claim, and enjoined the defendant from following the hearing procedures in question on the grounds that said procedures failed to meet minimal due process requirements of the Constitution. Pending disposition of this appeal by the Supreme Court, the Three Judge Court has stayed the operation of the injunction.

The questions presented are so substantial that they require plenary consideration, with briefs on the merits and oral argument.

Substantiality of Questions Presented.

A. The decision is of national importance.

Although this is not a case of first impression before this Court, there has been no written Memorandum of Decision by this Court on such a case. At issue primarily is whether or not the type of hearing procedures used in terminating or suspending unemployment compensation benefits meet minimal requirements of due process. The only unemployment compensation case ruled upon thus far by this Court is *Torres v. N. Y. State Department of Labor*, 405 U.S. 949 (1972) where this Court ultimately affirmed the two to one decision of a Three Judge Court for the District of New York to the effect that New York's hearing procedures did meet such requirements. No opinion was rendered, however, except that Three Justices noted their dissents. (This Court did

remand a similar unemployment compensation case, however, *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973) with direction to the lower court to determine if the matter had become moot.)

The Three Judge Court in *Torres* distinguished this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970) and held, in effect, that a "due process" hearing as required by *Goldberg* is not required in unemployment compensation cases because of the lack of the "brutal need" concept in unemployment compensation cases. The Connecticut Three Judge Court, however, has failed to follow *Torres*, at least insofar as the constitutional claim is concerned. The defendant submits that said court should have followed *Torres* on the constitutional claim just as it did on the statutory claim.

Because *Torres* was summarily affirmed by this Court without opinion, doubt exists whether *Torres* is to be as definitive in unemployment compensation cases as *Goldberg* is in welfare cases. The various states are thus left to guess whether their procedures are to be governed by the ruling in *Torres*. Until this Court clarifies its position on this point, all states will be in doubt as to the constitutionality of their hearing procedures in unemployment compensation cases.

In addition to this case, a similar appeal has been taken to this Court by the State of New Hampshire in *Pregent v. The State of New Hampshire, Department of Employment Security et al.*, F. Supp. (1973). It is imperative that this Court clarify this question.

CONCLUSION

This is a case involving substantial legal questions which require plenary consideration by this Court in order to finally determine whether administrative hearing requirements in unemployment compensation cases must be governed by the Court's ruling in *Torres v. N. Y. State Department of Labor*, Supra.

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General

DONALD E. WASIK
Assistant Attorney General

Attorneys for Appellants

PROOF OF SERVICE

I, Donald E. Wasik, Assistant Attorney General of the State of Connecticut, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on November 8, 1973, pursuant to Rule 33.3(b) of the Rules of the Supreme Court of the United States, I served a copy of the foregoing Jurisdictional Statement on Raymond J. Kelly, Esquire and John M. Creane, Esquire, by depositing the same enclosed in a sealed envelope, postage prepaid, in the United States mails, addressed to them at their last known address:

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Dated this 8th day of November, 1973.

Donald E. Wasik
Assistant Attorney General
State of Connecticut

In The

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OCTOBER TERM, 1973

No.

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA, and JUAN MIRANDA,

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Appellant.

ON APPEAL FROM A SPECIAL THREE JUDGE COURT FOR THE DISTRICT OF CONNECTICUT

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LARRY STEINBERG and CECIL PASKEWITZ
and DELIA TRIANA and JUAN MIRANDA

-v-

CIVIL
NO. 15, 104

JACK A. FUSARI, Commissioner of Labor,
The Administrator, The Unemployment.
Compensation Act, State of Connecticut

Before:

SMITH, Circuit Judge, BLUMENFELD and NEWMAN,
District Judges.

MEMORANDUM OF DECISION

SMITH, *Circuit Judge:*

This suit presents the question of whether either the Fourteenth Amendment, or §303 of the Social Security Act, 42 U.S.C. §503(a) (1), requires that recipients of Connecticut unemployment compensation benefits be afforded a *Goldberg v. Kelly*[1] hearing prior to being deprived of such payments. In addition, this case requires us to interpret the precise precedential significance of a series of rather bewildering summary dispositions of factually related suits by the Supreme Court.[2] For the reasons given below, we conclude that the Connecticut system fails to meet minimal due process standards, and therefore must be enjoined.

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[1] 397 U.S. 254 (1970).

[2] *See Torres v. New York State Department of Labor*, 405 U.S. 949 (1972), *reh. denied*, ____ U.S. ____ (March 5, 1973); *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973). These cases are discussed in some detail in part IV, *infra*.

I.

While the relevant factual background is complex, it is also undisputed, and has been the subject of a rather lengthy stipulation. Unemployment insurance benefits in Connecticut are paid entirely out of a trust fund maintained by the contributions of in-state employers, including interest and penalties.[3] So long as the state program meets federal statutory requirements, its costs of administration are met by the federal government, pursuant to §302 of the Social Security Act, 42 U.S.C. §502. The Social Security Act requires, *inter alia*, that states receiving such assistance have methods of administration "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. §502(a) (1).

The claimant's entry into the unemployment compensation system begins with the filing of a valid initiating claim. Conn. Gen. Stat. §31-230.[4] The state system of determining initial eligibility is not under attack here. After a determination of such eligibility is made, the claimant is instructed to report bi-weekly to his local unemployment compensation office. Upon reporting, he fills out a "Continued Claim for Unemployment Compensation," (U.C.-46), upon which he swears to his availability for work and his "reasonable efforts" to find work, among other things. The claimant also fills out a "Continued Claim Work Effort Information Form," (U.C.-45) when making his bi-weekly visit. He then enters the claims line and eventually presents the completed forms to an employee of the Unemployment Compensation Department.[5] If no questions arise, the claimant is routinely given his benefit checks for the two-week period at issue.

If the claims line employee raises an issue of possible disqualification, he sends the claimant to another line for a "seated interview." Upon reaching the head of this line, the claimant is interviewed by a "Fact Finding Examiner," who seeks to ascertain facts as to possible disqualification. If the examiner decides that the claimant is in fact qualified to receive benefits for the period in issue, he simply sends him back to the claims line, and checks are issued. If, however, the examiner decides that the claimant does not meet the statutory criteria for receiving assistance, the claimant is not given his checks, and is told that he will receive written notification of the Department's decision concerning his eligibility for the weeks in question. A letter is then sent out under the signature of the office manager, stating the reasons for non-payment and citing a statutory provision therefor.

Of necessity, questions will often arise during the "seated interview" which involve third-party information. If such a question arises, the fact finder will attempt to contact the third party while the claimant is present, and will take the information into consideration when reaching a decision. However, if the third party cannot be reached, the claims examiner may still proceed to make his own determination as to eligibility.[6]

The most common reason for the denial of benefits to a claimant is for failure to comply with Conn. Gen. Stat. §31-235(a), which requires that applicant make "reasonable efforts to obtain work" and be "able" and "available" to do the same.[7] Other common reasons for disqualification include refusal of a suitable job offer, *see* Conn. Gen. Stat. §31-236(1), and the fact that an applicant has received some form of disqualifying income, *see* §§31-236(4) and (7).

The eligibility determination is made on a week-to-week basis, even though the claimant visits the office only bi-weekly. Thus, it

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[3]Conn. Gen. Stat. §§31-261 through 31-271 deals with the creation and administration of that fund, including collection of employers' contributions.

[4]The standards for eligibility are set out in Conn. Gen. Stat. §31-235; various reasons for disqualification appear in §31-236.

[5]The state Labor Department contains an Employment Security Division, Conn. Gen. Stat. §31-237(a), subject to the supervision of the labor commissioner as administrator, *see* §31-222(a). Within the division, there are two departments, the state Employment Service Department and the Unemployment Compensation Department. §31-237(a). It is with the latter that the claimant chiefly deals.

[6]Subject to the statutory directive that coverage, eligibility and non-disqualification are to be presumed in doubtful cases. Conn. Gen. Stat. §31-274(c).

[7]The parties originally stipulated that these reasons accounted for between 60 and 70 per cent of all denials of benefits resulting from "seated interviews." At the hearing before this court, the defendant stated that this figure was in error, being based in part upon original denials of initiating claims. Defendant was unable, however, to provide us with a more accurate figure.

is possible that the fact finder will conclude that a claimant failed to make reasonable efforts to find work in one of the weeks at issue, yet allow benefits for the other. Similarly, it is the Department's policy that a claimant remains eligible for subsequent time periods so long as he satisfies the eligibility requirements for those periods, without regard to his past record.[8]

The Department deviates from its "seated interview" procedure in at least two instances. If an employee of the State Employment Service Department[9] has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising claimant of the reason for the hearing and of his right to bring counsel and witnesses.[10] The claimant then has the right to confront the employee at this hearing. In the routine case, benefits continue until the hearing is held.[11] Similarly, if information concerning the refusal of a suitable job comes from an interested employer — one whose "merit rating" account has been charged because of the termination of the claimant's employment[12] — notice of a proposed hearing is sent both to the claimant and the employer, and a procedure similar to the one above is followed.

However, since the majority of cases involve a fact finder's determination that the claimant has not made reasonable efforts

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[8]In practice, some of those who have been found ineligible for one claims period and have filed appeals have had later claims denied on the ground that "they have appeals pending." This is contrary to Department policy.

[9]*See* note 5 *supra*.

[10]If the claimant is scheduled to appear for a regular bi-weekly visit within two days, the notice is given to him personally then. The claimant can ask for an immediate hearing on that date, or can wait approximately five days for a hearing. If he opts for the latter course, he is routinely given his benefit checks. *But see* note 11, *infra*.

[11]Benefit checks may be withheld if the claimant provides the examiner with other disqualifying information, unrelated to the hearing subject matter, during his regular bi-weekly visit. For example, if a claimant awaiting a hearing discloses that he has been in the hospital for the past two weeks, the check may be withheld even though he is awaiting a hearing concerning his refusal of an allegedly suitable job referral.

[12]Employers' contributions to the unemployment compensation fund are determined through the operation of a complicated "merit rating" index system. Conn Gen. Stat. §31-226. *Inter alia*, the system operates to charge the employer's account for those claimants whose employment was terminated by him, and credits the employer for prompt rehiring of separated employees.

to find work, a pre-termination hearing is the exception, rather than the rule. Once the claimant receives written notice of the fact finder's decision, he may file an appeal. This appeal is heard by an Unemployment Compensation Commissioner, *see* Conn. Gen. Stat. §§31-241 and 31-242 who determines the matter of eligibility *de novo*. Unless "good cause" is "shown," Conn. Gen. Stat. §31-241, benefits for the period at issue are not paid pending appeal. No attack is made in this suit upon the procedures employed in the eventual Commissioner's hearing, which are statutorily mandated "as far as possible," to be "in accordance with the rules of equity." Conn. Gen. Stat. §§31-244 - 31-248.[13]

II.

A review of the factual situations of three of the named plaintiffs will serve to put the general background outlined above into sharper perspective.[15] Larry Steinberg had filed a valid initiating claim for

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[13]The state Unemployment Compensation Commission is a statutorily created body, comprised of six members, five from specified districts and one from the state at large. Conn. Gen. Stat. §31-238. It is a seperate entity from the unemployment compensation department of the labor department.

[14]Appeal may be taken from the Commissioner's decision to the Superior Court, and ultimately to the state Supreme Court. Conn. Gen. Stat. §31-249.

[15]The original complaint named as plaintiffs Larry Steinberg and Cecil Paskewitz, and requested a determination that the suit proceed as a class action. In a memorandum of decision dated November 13, 1972, Judge Newman granted the plaintiffs' motion to convene this statutory three-judge court; at the same time, he deferred consideration of the class action issue for this tribunal. For the reasons set out in part III, *infra*, we today hold that this suit may proceed as a class action.

At the time that the original motion to convene this court was under consideration, twelve additional plaintiffs sought to intervene. In the November 13 memorandum, Judge Newman denied ten of these requests. He granted the motions of Delia Triana and Juan Miranda to intervene, noting that these two were presently back on the unemployment compensation rolls after the disposition of their appeals, and thus had a particular interest in the procedures that might be employed in any subsequent terminations of their benefits.

The situation of Cecil Paskewitz has been the subject of a recent change of position of the defendant Administrator. Paskewitz had received weekly benefits from August, 1971, until February of 1972, covering a period of some 26 weeks. In February of 1972, Paskewitz applied for extended benefits under Conn. Gen. Stat. §31-232b *et seq*. The application was initially approved, but when Paskewitz went, on March 2, 1972, to the Enfield office to collect his extended benefit checks, he was told that he was no longer eligible and would not receive further assistance. His appeal of that decision has been heard by an Unemployment Commissioner; at the time this case was argued, no decision had been forthcoming.

The defendant Administrator now concedes that Paskewitz should have been given

benefits in Willimantic on or about April 17, 1971, and received weekly benefits through October 9 of that year. On October 27, Steinberg reported to the Willimantic Unemployment Compensation Office for his bi-weekly visit, and to claim benefits for the weeks ending October 16 and 23, 1971. He was directed from the claims line to a "seated interview." After some discussion with a fact finder, Steinberg was told that he would not receive the two weekly checks at issue, for failure to use "sufficient efforts to obtain work."

A formal notice, citing the statutory requirements of Conn. Gen. Stat. §31-235(2) was received by Steinberg on November 1, 1971, disqualifying him from benefits retroactive to October 10. Steinberg filed an appeal to the Unemployment Compensation Commission on November 5; a hearing was held on January 13, 1972. On May 10, 1972, the Commissioner upheld the Departmental fact finder; Steinberg did not seek review in the courts.

Delia Triana had received benefits in Bridgeport from June 18 through July 8, 1972. On about July 24, 1972, she visited the Bridgeport office to file for benefit checks covering the weeks ending July 15 and 22, 1972. She was directed to a "seated interview," where it was determined that she had not made sufficient efforts to find work for the two periods, and she did not receive her checks. At two subsequent bi-weekly appointments, Mrs. Triana was disqualified from receiving benefits for the period between July 29, 1972, and August 18, 1972, on similar grounds.

Mrs. Triana filed her original appeal on August 7, 1972; her case was heard on October 27. On November 10, 1972, the Commissioner upheld the denial of benefits for the first two-week period, but held that Mrs. Triana was entitled to benefits for the latter period. His decision was not appealed by either side.

Juan Miranda presents a similar situation. After the familiar

a hearing on the underlying issue, which involved a determination of whether he had compiled sufficient wage credits to have been initially eligible for benefits. The defendant has changed its policy so that future cases involving such entitlement determinations will be handled in the following manner. Claimants are to be notified of a hearing at a time and place certain, at which they may bring counsel and present evidence on the entitlement issue. Benefits will be paid to affected claimants until a written decision on the merits has been issued, following the noticed hearing.

"seated interview," he was denied benefits for the weeks ending August 19 and 26, 1972, on the grounds of having made insufficient efforts to find work. He was notified on September 11, 1972, that all claims from August 13, 1972, onward were disapproved on the above grounds. He filed a prompt notice of appeal; hearing was held on October 17, 1972. On October 24, 1972, the Commissioner held that the benefits from August 13 to the date of the appeal hearing were wrongly withheld. The Department did not appeal, and Miranda eventually received checks covering this time period.

III.

We turn first to plaintiffs' request to have this suit designated as a class action. The relevant class is claimed to be all present and future recipients of unemployment compensation benefits whose benefits are subject to termination without a prior hearing, with the exception of those persons whose benefits are terminated simply because of exhaustion of entitlement under Conn. Gen. Stat. §31-236. The class is so numerous that joinder is impracticable, and there are clearly common questions of law and fact. In addition, we find that the claims of plaintiffs Steinberg, Triana and Miranda[16] are typical of the claims of the class, and that these three representative plaintiffs will fairly and adequately protect the class interests. Since the defendant Administrator has rather clearly acted on grounds generally applicable to this class in allowing benefits to be terminated after a "seated interview," Rule 23(b) (2)'s requirements are met, and we designate this a class action. *See Wheeler v. State of Vermont*, 335 F. Supp. 856, 862 (D. Vt. 1971) (3-Judge court); *Crow v. California Department of Human Resources*, 325 F. Supp. 1314, 1316 (N.D. Cal. 1970); *Torres v. New York State Department of Labor*, 318 F. Supp. 1313, 1317-18 (S.D.N.Y. 1970).

We deal next with the defendant Administrator's claim that since the three class representatives have each now had a hearing before an Unemployment Commissioner, this case is moot. We cannot agree.

[16]Given the defendant Administrator's changed position with respect to Cecil Paskewitz and those similarly situated, *see* note 15, *supra*, we do not name Paskewitz as a class representative.

This suit was filed as a class action, and, although the formal determination of class status was made only today, the case has presumptively been a class suit since its inception. *See* 3B J. Moore, Federal Practice, ¶23.50 at 23-1103 & n. 12; *Torres, supra*, 318 F. Supp. at 1317. Thus, the fact that the named representatives have received their Commissioner's hearings does not end the matter; there are numerous class members who have either had their benefits terminated and have not yet received hearings, or who are subject to like treatment in the future. As to them, the matter is far from moot, and it would serve little but form for us to require these class members to intervene here — as some of them have sought[17] — simply to keep the name of someone who has not yet received a hearing in the case caption. The fact that the named plaintiffs have finally received hearings does not moot this action. *See* 3B J. Moore, *supra*, ¶23.40 at 23-651, 23-652 and cases cited therein.

There are other compelling reasons for not finding this case to be moot. The defendant Administrator has not taken the position that termination of benefits without hearing will not recur; indeed, he vigorously argues the merits of the present "seated interview" system. Thus, we can hardly conclude that "there is no reasonable expectation that the wrong [if in fact a wrong there be] will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Given the delays inherent in the litigation process, to find this case moot would amount to a directive to the defendant that the challenged conduct may be continued regardless of its legality, since it is quite unlikely that any plaintiff can successfully pursue a suit to completion before his Commissioner's hearing is scheduled. Since the class has a continuing controversy with the Administrator, this suit is not moot. *See Mindo v. New Jersey Department of Labor & Industry*, 443 F. 2d 824 (3rd Cir. 1971); *Wheeler, supra*, 335 F. Supp. at 860; *Crow, supra*, 325 F. Supp. at 1316; *Torres, supra*, 318 F. Supp. at 1316-17.[18]

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[17] *See* note 15, *supra*.

[18] The same conclusion would seem to have been reached, *sub silentio*, in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971).

Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973), upon which the defendant relies, does not compel a different result. In *Burney*, a three-judge Indiana district court had held, in factual circumstances analogous to those presented here, that Indiana's system of terminating unemployment benefits without a prior hearing was in conflict with the "payment when due" provisions of the Social Security Act, 42 U.S.C. §503(a)(1). The Supreme Court noted probable jurisdiction, 406 U.S. 956 (1972), but on January 17, 1973, in a brief *per curiam* opinion, remanded the case to the district court "to consider whether it has become moot." The Court noted that Mrs. Burney, who was the only named class representative, had succeeded, at a point in time after the entry of the district court summary judgment, in having her determination of ineligibility reversed. She had consequently been awarded fully retroactive benefits. In view of "the question whether there continues to be a case or controversy in this lawsuit," the Supreme Court remanded to the district court for further findings.

At the outset, it is useful to note exactly what the Supreme Court did and did not do in *Burney*. It did not find the case to be moot, but only raised the issue and asked the district court to consider it. Thus, narrowly read, *Burney* only stands for the proposition that when the only class representative succeeds in gaining full retroactive benefits while the case is pending before the Supreme Court, the district court should consider the issue of mootness. Even if the case at hand were at all factually similar to the *Burney* situation, this court has done precisely that, and has concluded that the case is not moot.

And, as must seem evident from the above summary of the facts in *Burney*, there are a number of pertinent points of distinction between that case and this one. While Mrs. Burney

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In that case, two California unemployment compensation recipients had challenged that state's practice of suspending benefit payments when an employer took an appeal from an initial eligibility determination. They filed a class-action complaint in federal district court; they then had hearings before an Appeals Board Referee. The three-judge district court enjoined the California procedure on both constitutional and statutory grounds, 317 F. Supp. 875 (N.D. Cal. 1970), never discussing the mootness issue. The Supreme Court affirmed on the statutory ground alone, and never once intimated that the case might be moot.

was the sole class representative there, here there are three — Steinberg, Triana and Miranda. Of these three, only Miranda is in a situation similar to that of Mrs. Burney, having received retroactive benefits after winning his appeal. Steinberg never "succeeded in obtaining a reversal of the initial determination of ineligibility," 409 U.S. at 541, made at the "seated interview"; Mrs. Triana succeeded only in part.

Moreover, we note that the "new facts" that prompted the *Burney* remand — Mrs. Burney's winning of her appeal — took place after the district court decision was rendered. The Supreme Court may well have simply wanted the district court to evaluate this new development, particularly in light of the possibility that the sole named class representative might not now be interested in further vigorously pursuing the suit. Here, all the operative facts have taken place *before* today, and have been given our full consideration. We have had an opportunity to witness the able prosecution of this suit by the class representatives even after they had received Commissioner's hearings. We are confident that such exemplary representation will continue, should further proceedings be necessary. Thus, whatever apprehensions may have caused the *Burney* remand for consideration of the mootness issue, this court has had the opportunity to evaluate defendant's mootness arguments at the present time, and finds them without merit.

IV.

As noted at the outset, plaintiffs challenge the "seated interview" system on two grounds: (1) that it fails to provide minimal Fourteenth Amendment due process; and (2) that it conflicts with the "payment when due" directive of §303(a)(1) of the Social Security Act, 42 U.S.C. §503(a)(1). Since any discussion of these issues is dominated by the manner in which the Supreme Court has recently treated a series of similar cases, it is to that background that we now turn.

The starting point is the decision of a three-judge court in *Torres v. New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), in which the New York practice of terminating unemployment benefits without a prior hearing was challenged.

In a 2-1 decision, the court rejected the plaintiffs' Fourteenth Amendment claims, distinguishing *Goldberg v. Kelly* on the ground that it was a welfare case, hence involving "brutal need" and a special necessity for pre-termination hearings. The court unanimously rejected the plaintiffs' statutory claim, reasoning that when a departmental employee had determined that a claimant is disqualified because of his inadequate efforts at finding work, it could not be said that payments are "due." The Torres court explicitly rejected the authority of *Java v. California Department of Human Resources Development*, 317 F. Supp. 875 (N.D. Cal. 1970), in which California unemployment compensation procedures were held in conflict with both the Fourteenth Amendment and the Social Security Act.[19] 321 F. Supp. at 438 n. 1.

An appeal followed, but before it was decided, the Supreme Court affirmed the judgment of the district court in *Java*, 402 U.S. 121 (1971). The Court held that the California scheme was in conflict with the "payment when due" provisions of §303(a)(1), and thus did not reach the constitutional issue. Consequently, the Court remanded *Torres* to the three-judge court for further consideration in light of *Java*. 402 U.S. 968 (1971).

On remand, the *Torres* three-judge court unanimously adhered to its former decision on the statutory point. 333 F. Supp. 341 (S.D.N.Y. 1971). The *per curiam* opinion noted that the California system attacked in *Java* involved automatic termination of unemployment benefits whenever an employer filed an appeal from an eligibility determination. The practice under challenge in New York, however, involved suspension of payments after an administrative determination of disqualification, which followed an interview with the claimant. The court reasoned that payments could not be said to be "due" in New York after an administrative official had made a determination that they were not. This was contrasted with the California system, where payments were automatically suspended upon an employer's appeal, even though an administrative official had in fact determined that the claimant

[19] *See* note 18, *supra*.

was eligible, or put another way, that payments were "due." The *Torres* court adhered to its original decision on the constitutional issue, again splitting 2-1. *Id.* at 343.

A new appeal was filed. On February 28, 1972, the Supreme Court summarily affirmed, 405 U.S. 949. No opinion was filed. Justices Douglas, Brennan and Marshall noted their dissents, simply stating that *Goldberg v. Kelly* required reversal.

This, however, was not the final chapter. In the period before the *Torres* affirmance, an Indiana three-judge court, facing issues seemingly identical to those in *Torres*, found Indiana procedures in conflict with §303(a)(1) of the Act. *Hiatt v. Indiana Employment Security Division*, Civ. No. 70 F 122 (N.D. Ind. Oct. 27, 1971). One of the *Hiatt* plaintiffs was in a factual situation identical to that in *Java*, and the state did not appeal as to him. The other plaintiff, however, had her benefits suspended not because of an employer's appeal, but for insufficient efforts to find work. The state appealed as to her. Instead of simply vacating the judgment on the basis of *Torres*, the Supreme Court noted probable jurisdiction *sub nom. Indiana Employment Security Division v. Burney*, 406 U.S. 956 (1972).

The *Torres* plaintiffs noted this apparent anomaly. Consequently, they filed a petition for rehearing, arguing that any decision on the statutory claim in *Burney* would necessarily control their case. *Inter alia*, the *Torres* plaintiffs also argued that the Supreme Court's decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972), which came after the *Torres* affirmance, undercut the district court's reliance upon "brutal need" as a prerequisite to due process claims, and hence necessitated a new look at the Fourteenth Amendment claim.

However, as noted above, the Court did not reach the merits in *Burney*, instead remanding the case for the district court to consider the issue of mootness. 409 U.S. 540 (1973). Justices Marshall and Brennan dissented, disagreeing with the mootness suggestion and arguing that *Goldberg v. Kelly* required affirmance.

Several months later, on March 5, 1973, the rehearing petition in *Torres* was denied, again without opinion. ..... U.S.....

Justice Marshall, joined by Justices Douglas and Brennan, dissented, outlining the prior history of *Torres* and *Burney* and complaining that the Court "finally disposes of important issues of constitutional law and statutory construction in a fashion which can only be characterized as bizarre." The three dissenters again noted their position that *Goldberg v. Kelly* required a prior hearing in these circumstances and argued that it was likely that *Java* required a finding of a statutory violation.

V.

Were we writing on a somewhat cleaner slate, we would have little difficulty in rejecting the reasoning of the district court in *Torres*, and concluding, largely for the reasons so ably set out by Judge Oakes in *Wheeler v. State of Vermont, supra*, that the Connecticut unemployment compensation procedures here challenge conflict with both the Fourteenth Amendment and the Social Security Act. *See also Crow, supra; Hiatt, supra; Java, supra.* But, such a course is not open to us. It is the law of this circuit that a summary affirmance by the Supreme Court is entitled to full precedential weight, *Doe v. Hodgson*, ____ F. 2d ____, slip op. 3201, 3205 (2d Cir. May 1, 1973), despite a number of suggestions elsewhere to the contrary. *See, e.g., Dillenburg v. Kramer*, 469 F. 2d 1222, 1225 (9th Cir. 1972); *Serrano v. Priest*, 487 P.2d 1241, 1264 & n. 35, 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1971). *Cf.* Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. Chi. L.Rev. 1, 74 n. 365 (1974).[20] As a district court sitting in the Second Circuit, we are bound by this rule. *See Lewis v. Rockefeller*, 431 F.2d 368, 371 (2d Cir. 1970).

Thus, the threshold question before us is whether the summary affirmance in *Torres* forecloses inquiry into the merits here. The state so argues, and draws at least inferential support from Mr.

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[20] If nothing else, the procedural history outlined in part IV, supra, provides much ammunition to those who would abolish both the three-judge court requirement and direct appeal to the Supreme Court in constitutional cases. *See generally* Report of the Study Group on the Caseload of the Supreme Court 25-34 (1972). *Cf. Roe v. Ingraham*, ____ F. 2d ____, slip op. 3761, 3768 n. 4 (2d Cir. May 24, 1973) and sources cited therein.

Justice Marshall's lament that denial of rehearing in *Torres* "finally disposes" of the relevant questions. But, there are at least several reasons for supposing that the important issues here cannot be disposed of simply through a citation to *Torres*. For one thing, there is the Supreme Court's noting of probable jurisdiction in *Burney*. That case involved issues seemingly identical to those in *Torres*. Since the noting of probable jurisdiction represents at least a preliminary conclusion by the Court that substantial issues are posed by an appeal, *cf. Sugarman v. United States*, 249 U.S. 182, 184 (1919); *Brolan v. United States*, 236 U.S. 216, 218 (1915); R. Stern & E. Gressman, *Supreme Court Practice* 230-38, 356-60 (4th ed. 1969); this action in *Burney* must stand for the proposition that *Torres* does not absolutely foreclose inquiry into the area.

Moreover, a summary affirmance which, like that in *Torres*, recites no reasons or factual background, provides at least some difficulties in precedential interpretation. The affirmance is entitled to precendential weight, to be sure, but divining the precise content of the precedent remains difficult. In *Doe v. Hodgson, supra*, the Second Circuit resolved that dilemma by looking to the holdings in the district court below, and implicitly assuming acceptance of them by the Supreme Court. It would seem that the same course is mandated here, where the plaintiffs make serious claims that the case at hand is distinguishable, both factually and legally, from *Torres*.

Put another way, we view the summary affirmance in *Torres* as standing for the proposition that the Supreme Court at that time thought that the district court's application of the law to the particular facts presented was correct. Plaintiffs claim that the law has so evolved since *Torres*, and that the facts here are so different, that either of the two elements independently would justify a different result here. To evaluate that argument, we must necessarily focus on what the *Torres* court said, and how this case is alleged to differ.

A.

Judge Hays' opinion for the three-judge court in *Torres* treated the constitutional issue in the following manner. The opinion began

by noting that plaintiffs placed primary reliance on *Goldberg v. Kelly*. However, Judge Hays maintained, there was a crucial difference between *Goldberg* and the case at hand: *Goldberg* dealt with the issue of pre-termination hearings for welfare recipients. The three-judge court then quoted those portions of the *Goldberg* opinion which stressed this factor, and noted the "unique situation" and "brutal need" of those whose only source of sustenance is withdrawn. *See* 321 F. Supp. at 436 (quoting from 397 U.S. at 261).

Judge Hays then noted that while need is a criterion for eligibility for the kind of welfare payments involved in *Goldberg*, unemployment compensation carries with it no needs test. *Id.* at 437. *See* S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). Moreover, the claimant denied unemployment benefits in New York could qualify for welfare, if the requisite need were shown.

> "Thus the worst possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief."
> 321 F. Supp. at 437.

The opinion then went on to maintain, quoting from *Escalera v. New York City Housing Authority*, 425 F. 2d 853, 867 (2d Cir.) *cert. denied*, 400 U.S. 853 (1970), that

> "The minimum procedural requirements of due process under the Fourteenth Amendment must reflect the balance between the government's interest in efficient administration and the nature of the individual's interest being affected by governmental action."
> 321 F. Supp. at 437.

The governmental interests involved in *Torres* were seen to be those involved in making accurate eligibility determinations without undue pressures of speed, and the difficulties in recouping amounts erroneously paid out. The district court majority saw these interests as outweighing the interests of the individuals involved, since it

defined the latter as the possibility that a claimant might have to live off his savings or welfare for the "few weeks" between termination and a full hearing. These individual stakes were viewed as much less momentous than those presented by the "brutal need" situation in *Goldberg*.

Plaintiffs have directed two lines of attack at the *Torres* opinion, and derivatively, at the summary affirmance. Their first point is that Supreme Court decisions since the *Torres* affirmance have discredited the district court's due process analysis, and thus the summary affirmance is no longer good law. This argument finds some succor in *Fuentes v. Shevin*, 407 U.S. 67 (1972). There, in striking down prejudgment replevin laws as violative of due process, the Court labeled as "narrow" any reading of *Goldberg* that stressed the "necessary" nature of welfare benefits. *Id.* at 88-90. While such factors might be relevant to the *form* of due process hearing, *id.* at 89 n. 20, the Court emphasized that the Fourteenth Amendment required some sort of notice and hearing before deprivation of all but *de minimis* property interests. *Id.* at 90 & n. 21.

Plaintiffs seize upon this language and that in more recent Supreme Court decisions, *e.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972), and contend that the *Torres* due process rationale is no longer viable, if indeed it ever was. Consequently, they ask us to hold that we are not at all bound by the *Torres* due process holding.

While it does seem clear to us that cases subsequent to the *Torres* affirmance have made it clear that *Goldberg's* scope is not confined to deprivations of "necessary property" which result in "brutal need," we do not view this "change of law" as sufficient reason, in and of itself, to ignore the *Torres* holding. This decision is mandated by the Second Circuit's opinion in *Doe v. Hodgson, supra*. There, the panel noted that under recent trends in equal protection law, the Supreme Court's decision in *Romero v. Hodgson*, 403 U.S. 901 (1971), was open to serious attack. Nonetheless, the appellants were told that any further pronouncements on the

subject would have to come from the Supreme Court. _____F. 2d _____; slip op. at 3206-7. Thus, even assuming *arguendo* that recent due process developments undercut the *Torres* rationale, the Second Circuit's decision forecloses us from avoiding *Torres* on that ground alone.

Nonetheless, we are persuaded by plaintiffs' second argument that the *Torres* affirmance does not foreclose the claims made here. As noted above, in deciding exactly what sort of procedures were mandated by the due process clause in the *Torres* situation, Judge Hays found that the claimant's interests were measured by the possibility that he might have to live off his savings or welfare in the "few weeks" between termination and a full hearing. Those interests were found not to outweigh the governmental interest in accurate and unhurried determinations of eligibility, and the difficulties inherent in recouping mistaken payments. Plaintiffs here argue that, even assuming *arguendo* the correctness of the *Torres* balancing, the factual situation of the Connecticut claimant is sufficiently different from that of the New Yorker to require a different result.

In *Torres*, the record indicated that the average disputed compensation case took 45 days determination. 321 F. Supp. at 439 (Lasker, *J.*, dissenting). This period, then, is the "few weeks" during which the terminated New York claimant might have to rely upon savings or welfare, while awaiting his hearing on the merits of the termination issue. Even if the "briefness" of this period cut against the *Torres* plaintiffs' due process point,[21] it is abundantly clear that the relevant delays in Connecticut are far longer. The record indicates that of the 461 intrastate appeals disposed of in Connecticut during December of 1972, fully 414 took at least 101 days between the time an appeal was filed and the date a final decision was reached. Put in percentage terms, this means that about 89.8% of all appeals took over 100 days to decide. And, the figures indicate that 61.4% of all appeals take over 125 days to dispose of, while 29.5% consumed over 150 days before the Com-

[21] *Compare Wheeler, supra*, 335 F. Supp. at 861, where Judge Oakes viewed a five-week delay as "unreasonable."

missioner's decision.[22] Figures from other months strongly suggest that the December figures are not unrepresentative.[23]

It may be one thing to find the claimant's due process claims insufficient in New York, where 45 days are consumed awaiting a decision in the average appeal, but it is quite another to do so in Connecticut, where the average delay is well over 126 days, or 18 weeks. And, while New York had Aid for Dependent Children programs available for those struck by "brutal need" during the 45-day period, Connecticut, with its substantially longer delays, does not participate in the Aid for Dependent Children-Unemployed

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[22]The above figures derive from an exhibit prepared by plaintiffs after detailed examination of Unemployment Compensation Commission records. Their accuracy is not challenged by the defendant Administrator. The figures cover the 461 intrastate appeals disposed of by written decision in December, 1972; interstate appeals, which involve obtaining work and wage records from the state of the claimant's prior residence, were not included, as they generally involve even longer delays.

The aggregate figures are as follows:

Days Between Filing of Appeal and Commissioner's Decision	Number of Appeals In Category	Percentage of Total
0-30	1	.2%
31-45	2	.4%
46-75	9	2.0%
76-100	35	7.6%
101-125	131	28.4%
126-150	147	31.9%
Over 151	136	29.5%
	461	

[23]The state Labor Department must submit a "Form ES-221" entitled "Benefit Appeals" to the United States Department of Labor on a monthly basis. That form provides information about the time lapse between the date of filing an appeal and the date of mailing the Commissioner's decision. The time lapses are broken into four categories: 0-30 days, 31-45 days, 46-75 days, and over 75 days. (Compare the more detailed breakdown for December, 1972, in note 22, *supra*). The following table represents the figures presented for intrastate appeals in the three most recent months, for which data was submitted.

Number of Days	March, 1973	February, 1973	January, 1973
0-30	3	0	0
31-45	4	1	0
46-75	2	6	3
Over 75	676	521	503
Total	685	528	506

Parents program.[24] If the appropriate weighing of governmental interests against those of the individual is really a case by case process, *see Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961), it seems patent that the results of the weighing process employed in *Torres* are inapplicable here. We thus hold that the *Torres* affirmance does not foreclose our independent appraisal of the merits of plaintiffs' constitutional claim.

On the merits of that due process claim, recent Supreme Court decisions seem to mandate a two-part inquiry. The first question is whether plaintiffs here have a sufficient "property" interest in receipt of unemployment compensation to trigger Fourteenth Amendment due process requirements. *See generally Board of Regents v. Roth, supra*, 408 U.S. at 576-579; *Perry v. Sinderman, supra*, 408 U.S. at 599-603. It seems clear to us that such a "property" interest is present here. The Supreme Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *Roth, supra*, at 571-72. The Court recently characterized *Goldberg v. Kelly* as standing for the proposition that

> "[A] person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process."
> *Roth, supra* at 576.

That being the case, it follows *a fortiori* that one who has been receiving unemployment benefits under identical conditions has a similar "property" interest. *See also Fuentes, supra*, 407 U.S. at 88-90. It makes little difference to contend, as the defendant does here, that those who fail the "seated interview" test are not entitled to benefits, and hence do not have "property" interests. As in *Goldberg*, that entitlement is precisely what is at issue, and the "property" interest cannot be terminated or suspended without Fourteenth Amendment due process.

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[24]Connecticut does, however, have a system of "town" assistance. Conn. Gen. Stat. §17-272 *et seq.*

The second part of the inquiry is what form of procedural due process is necessary to protect the particular "property" interest involved. *Fuentes, supra,* 407 U.S. at 90 n. 21; *Goldberg, supra.* The defendant Administrator argues that the "seated interview" satisfies minimal due process standards. He contends that the large bulk of disqualifying information is provided by the claimants themselves; he distinguishes *Goldberg v. Kelly* on the ground that the claimant here at least has an opportunity to argue his case to the fact finding examiner. Finally, it is claimed that, in the absence of *Goldberg* "brutal need," the informal system here conforms with Fourteenth Amendment requirements.

Even accepting *arguendo* defendant's arguments about the absence of "need" among unemployment compensation claimants, and noting the ability of plaintiffs here to at least confront the decision maker, we still think it clear that the "seated interview" system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification. *Compare Goldberg v. Kelly, supra,* 397 U.S. at 266-71.[25]

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[25]To be sure, the claimant has somewhat constructive notice that, on bi-weekly occasions, he may be asked to undergo a "seated interview" and satisfy the examiner as to his efforts and availability for work. But, even leaving aside the problem that notice alone cannot replace the meaningful opportunity to present evidence, *cf. Wheeler v. Montgomery,* 397 U.S. 280 (1970), several difficulties remain. The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session, on the off chance that a "seated interview" will result. Nor can the claimant be certain in advance of the subject matter of the interview. While questions involving reasonable efforts at finding work are most common, "seated interviews" can and do involve numerous other grounds for possible disqualification. *Cf.* Conn. Gen. Stat. §31-236 & n. 7 *supra.*

It might also be noted that the record discloses some uncertainty about the standard against which "reasonableness" is measured. Theodore Hatcher, Unemployment Compensation Director for Connecticut, testified that there is an informal rule of thumb that the claimant must list at least three places at which he has sought employment a week on his U.C.-45. In response to a question from this court, Mr. Hatcher said that claimants were advised of this rule at their benefit rights interview. However, Eleanor H. Smarz, manager of the Bridgeport Unemployment Compensation office, responded to a question about whether claimants were told of the "rule of thumb" by stating:

> "It was not an official notification that they were to tell these people, if that is what happened. But this is, there's no official number or anything in reference to this."

Thus, serious questions arise about whether a claimant can ever meet a burden of proof based on a "rule of thumb" that he has never heard of. Indeed, even Mr. Hatcher conceded that in "crash periods" not everyone receives a benefit rights interview, at which the information is supposedly imparted.

To be sure, due process requires something less in this context than a full-blown trial. Indeed, it might even be that differences in "need" requirements between welfare and unemployment benefits could justify somewhat less comprehensive procedures here than were required in *Goldberg.*[26] But, whatever the minimal requirements of Fourteenth Amendment due process in this context, the "seated interview" system does not provide them. At the very least, claimants are entitled to some advance notice of the hearing and precise issues to be considered, with the concomitant opportunity to present evidence and bring counsel.[27] Of course, formulation

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[26]Of course, even if "need" is not a prerequisite to eligibility for unemployment benefits, it does not necessarily follow that the average claimant is not in need. *See generally Java, supra,* 402 U.S. at 130:

> "A kind of 'need' is present in the statutory scheme for insurance, however, to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment."

And *id.* at 131-32:

> "Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." (footnote omitted)

Recent statistics suggest that the average unemployment compensation recipient is hardly well-off. In 1970, the average wage covered by unemployment insurance in the United States was $141.09; in Connecticut, it was $149.76. The average weekly benefit in that year in the United States was $50.31, or 35.7% of the average covered wage; in Connecticut, it was $60.26, or 40.2% of the wage. United States Department of Labor, Handbook of Unemployment Insurance Financial Data 1938-1970 at 139 (1971). Other studies suggest that the average claimant is often in dire straits. *See generally* Motion for Permission to File Brief Amici Curiae and Brief Amici Curiae of National Employment Law Project, et al., in *Indiana Employment Security Division v. Burney,* and sources cited therein.

[27]Of course, the defendant may simply choose not to have a preliminary hearing at all, and allow benefits to be paid pending the full hearing before the Commissioner.

of an appropriate system is in the first instance a responsibility of the defendant Administrator. But when an administrator is making as subjective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case, and to meet any unfavorable evidence. This the present system does not do.

B.

With regard to the statutory question, plaintiffs have made a number of arguments designed to distinguish *Torres* and avoid the force of the Supreme Court's summary affirmance. First, they point to the differences, outlined above, between the time periods a claimant encounters in New York and Connecticut while waiting for his appeal to be decided. Secondly, they present statistics showing that a significant number of claimant appeals result in reversals of the original disqualification decision, a factor apparently not taken into account by the *Torres* court.[28] *Compare Crow*, *supra*, 325 F. Supp. at 1318 & no. 2 (noting that 32% of those eventually receiving full hearings are found eligible).

Taking these facts together, plaintiffs argue that even if the New York system could be seen as providing payments "when due," the Connecticut procedure, with its lengthier delays and large reversal rate, presents a different problem. In the abstract, the argument has much force. If the purpose of unemployment compensation really is "salary replacement" and providing benefits to the worker as close to the date of unemployment as possible, *see Java*,

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See Goldberg v. Kelly, 397 U.S. at 267 n. 14. That choice, however, is up to the state, particularly in light of possible difficulties in recouping benefits erroneously paid during the period before a hearing is held.

[28]The statistics are derived from the "Form ES-221," *see* note 23, *supra*. One portion of that form breaks down the monthly total of appeals decisions into those appeals taken by claimants, and those decided in favor of claimants. For the period of July, 1971, to June, 1972, there were 6534 claimant appeals, and 1706 of these were resolved in favor of claimants, for a reversal figure of about 26.1%. In the period from July, 1972, to October, 1972, there were 769 reversals out of 2959 claimant appeals, or about 26.0%. In the three-month period from January, 1973, through March, 1973, there were 1759 claimant appeals, and 342 reversals, or a rate of about 19.4%.

supra, 402 U.S. at 129-133, it would seem that a system that makes large numbers of those with valid claims wait on the average of over 100 days before allowing them benefits conflicts seriously with the statutory objectives.

But for us to accept the statutory challenge being made here would be to disregard what occurred in *Torres*. As will be remembered, the original judgment of the *Torres* court was vacated and remanded for consideration in light of *Java*. 402 U.S. 968 (1971). With its attention thus focused on the statutory issue, the *Torres* court nonetheless adhered to its original decision. 333 F. Supp. 341 (S.D.N.Y. 1971). It distinguished *Java* because that case had involved the automatic suspension of benefits upon the taking of an appeal by the employer. The court then met the "when due" problem with a holding that had nothing to do with either average delay periods or reversal rates. Quite simply, the *per curiam* opinion stated that, because of the administrative determination made at the interview of the claimant, it simply could not be said that payments were "due." The Court stressed the fact that the administrative determination was made on the basis of facts not previously available. It was this opinion that the Supreme Court summarily affirmed.

The summary affirmance would thus seem to stand for the proposition that payments are not "due" until a hearing is held and someone says they are. In that case, the factual distinctions offered by plaintiffs here are of no avail, and we would seem to be bound by the *Torres* affirmance to reject the statutory argument.

To be sure, the Supreme Court did note probable jurisdiction in *Burney*, a case decided solely upon statutory grounds below. But we are still left with three key facts: (1) the Supreme Court remanded *Torres* for reconsideration on the statutory grounds; (2) the district court responded with a theory which, if accepted, would foreclose the claims made here, and, (3) the Supreme Court summarily affirmed. In light of that scenario, we are not free to decide the issues *de novo*. *Burney* may well evidence the Court's own willingness to clarify or distinguish *Torres*, but until such a step is forthcoming, we are bound by that case's rejection of the argu-

ments put forth here.

VI.

While we find that state's procedure for terminating unemployment compensation benefits lacking in due process in a number of respects, we note that conforming to the requirements of due process will not necessarily require the remedying of every deficiency. Essentially, we find due process lacking because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time. The state thus has three areas in which to make improvements. For some cases, it can provide for an expedited hearing *de novo*. For others, it can bring the initial hearing procedures up to a minimum standard of fairness. In this regard, essential fairness can be expeditiously achieved in some instances by setting forth and communicating to claimants in advance a quantifiable standard concerning reasonable effort to find employment.[29] For example, if a stated number of employers must be visited, a claimant's acknowledgment that he had seen fewer than the required number would eliminate the factual controversy and provide an adequate basis for denial of benefits. Finally, in those cases where proper hearings or reasonably prompt *de novo* review are for some reason burdensome, the state can always consider paying the benefit for the disputed week, reserving the right to set off that week's payment against a future week's benefit once the proper procedure for an adverse determination has finally been followed. Of course, the choice of methods to bring its procedures into compliance with the Due Process Clause rests with the state.

In summary, then, we find that the "seated interview" system as currently used for terminating or suspending the payment of unemployment compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution. We accordingly enjoin the defendant Administrator, his successor in office, agents, and employees from administering Chapter 567,

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[29]While the record discloses some evidence of a quantified standard, it is not clear that this standard is communicated to claimants, or even that all administrators are aware of it. *See* footnote 25, *supra*.

Conn. Gen. Stat. (§31-222 *et seq.*) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according them a constitutionally sufficient prior hearing.

This opinion shall serve as the court's findings of fact and conclusions of law, under Fed. R. Civ. P. 52(a).

Dated: September 17, 1973.

J. Joseph Smith
United States Circuit Judge

M. Joseph Blumenfeld
Chief United States District Judge

Jon O. Newman
United States District Judge

STATUTES INVOLVED

42 U.S.C. § 503. "State laws, provisions required; stopping payments on failure to comply with law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for-

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . . . "

Conn. Gen. Stat. §31-235. "Benefit eligibility conditions; qualifications.

An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that . . . (2) he is physically and mentally able to work and is available for work and has been and is making reasonable efforts to obtain work, provided a woman shall not be required to be available for work between the hours of one and six o'clock in the morning; . . . . "

Conn. Gen. Stat. §31-236. "Disqualifications.

An individual shall be ineligible for benefits (1) if the administrator finds that he has failed without sufficient cause either to apply for available, suitable work when directed so to do by the public employment bureau or the administrator, or to accept suitable work when offered him by the public employment bureau or by an employer, such ineligibility to continue for the week in which such failure occurred and for the next four following weeks. Suitable employment shall mean either employment in his usual employment or other employment for which he is reasonably fitted, provided such employment is within a reasonable distance of his residence, and, in determining whether or not any work is suitable for an

individual, the administrator may consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training and experience, his skills, his previous wage level and his length of unemployment, but, notwithstanding any other provision of this chapter, no work shall be deemed suitable nor shall benefits be denied under this chapter to any otherwise eligible individual for refusing to accept work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout or other labor dispute; (b) if the wages, hours or other conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization; . . . . "

Conn. Gen. Stat. §31-238. "Unemployment commission.

(a) The governor shall appoint six persons, one for each of the following districts: First district, consisting of the county of Hartford; second district, consisting of the counties of Middlesex, New London, Tolland and Windham; third district, consisting of the towns of Bethany, Branford, Cheshire, East Haven, Guilford, Hamden, Madison, Meriden, Milford, New Haven, North Branford, North Haven, Orange, Wallingford, West Haven and Woodbridge, in the county of New Haven; fourth district, consisting of the county of Fairfield, and fifth district, consisting of the county of Litchfield and the towns of Ansonia, Beacon Falls, Derby, Middlebury, Naugatuck, Oxford, Prospect, Seymour, Southbury, Waterbury and Wolcott, in the county of New Haven, and one for the state at large, to be known, collectively, as the unemployment commission. The term of office of such commissioners shall be five years from the first day of January next succeeding the date of appointment. During the month of October, annually, the governor shall appoint a successor to the unemployment commissioner whose term expires on the January first next following. After notice and public hearing, the governor may remove any commissioner for cause and for the good of the public service. Any vacancy shall be filled by appointment by the governor for the

unexpired portion of the term. Each commissioner shall be paid from the employment security administration fund a salary to be fixed by the governor and the commissioner of finance and control, and shall be reimbursed for any necessary expenses incurred in the discharge of his duties. During the month of January in each year, the governor shall designate a member of said commission to be its chairman, who shall receive for his services as chairman such additional salary as may be fixed by the governor and the commissioner of finance and control. The governor may appoint, for terms designated by him but expiring not later than six months after the date of such appointment, such additional commissioners as may be necessary to handle a congestion of appeals. Such additional commissioners shall have the same powers in the hearing and disposition of appeals as the commissioner in whose district they are sitting.

(b) The chairman shall be the executive head of the unemployment commission, and in addition to the usual powers and duties of that office he may employ such persons and make such expenditures and take such other action as may be necessary or suitable for the proper functioning of the commission and may delegate to any unemployment commissioner or any person employed by the commission such authority as he deems reasonable and proper for the effective administration of his duties. He shall assign commissioners and additional commissioners to such duties in such parts of the state as he deems necessary for the proper functioning of the commission. If any commissioner or additional commissioner dies or his term ends before the final settlement of any matter in which he has been acting in his official capacity, his successor in office or a commissioner designated by the chairman may continue such matter to its completion. The chairman shall have power to certify to official acts. (c) The expenses of administration of the commission shall be paid from the employment security administration fund by the treasurer, notwithstanding the provisions of section 4-86, on warrants drawn by the comptroller at the direction of the chairman of the commission."

Conn. Gen. Stat. §31-241. "Initial determination. Appeal.

The administrator, or a deputy or representative designated by

him and hereinafter referred to as an examiner, shall promptly examine the initiating claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid and, if valid, the weekly amount of benefits payable and the maximum possible duration thereof. He shall promptly notify the claimant of the decision and the reasons therefor, which notification shall set forth the provision of this section for appeal. The administrator, or deputy or representative designated by him and hereinafter referred to as an examiner, shall promptly examine each claim for a benefit payment for a week of unemployment and, on the basis of the facts found by him, shall determine whether or not the claimant is eligible to receive such benefit payment for such week and the amount of benefits payable for such week. He shall promptly notify the claimant, and the employers against whose merit rating accounts compensable separations due to any benefits awarded by the decision might be charged, of the decision and the reasons therefor, which notification shall set forth the provision of this section for appeal, provided any employer who claims that the claimant is ineligible for benefits because his unemployment is due to the existence of a labor dispute at such employer's factory, establishment or other premises, shall be notified of the decision and the reasons therefor, whether or not a compensable separation due to benefits awarded by the decision might be charged against such employer's merit rating account. The state and any political subdivision subject to this chapter shall be notified of any decision on a claim in which it is designated as a base period employer. Such decision shall be final and benefits shall be paid or denied in accordance therewith unless the claimant or any of such employers, within seven days after such notification was mailed to his last-known address, exclusive of any Sundays or holidays falling within such period, files an appeal from such decision and applies for a hearing. If the last day for filing an appeal falls on any day when the offices of the employment security division are not open for business, such last day shall be extended to the next business day. If a hearing is requested, the payment of any benefits that might be affected thereby shall be made only after final determination by a commissioner. No examiner shall participate in any case in

which he is an interested party. Any person who has filed a claim for benefits pursuant to an agreement entered into by the administrator with the proper agency under the laws of the United States, whereby the administrator makes payment of unemployment compensation out of funds supplied by the United States, may in like manner file an appeal from the decision on such claim and apply for a hearing, and the United States or the agency thereof which had employed such person may in like manner appeal from the decision on such claim and apply for a hearing."

Conn. Gen. Stat. §31-242. "Appeal from examiner's decision.

Unless such appeal is withdrawn, a commissioner shall hear the claim, de novo, and render a decision thereon. Notice, by mail or otherwise, of the time and place of such hearing shall be given each interested party not less than five days prior to the date appointed therefor. The parties, including the administrator, shall be notified of the commissioner's decision, which notification shall be accompanied by a finding of the facts upon which the decision is based. Such hearing shall be held by the commissioner appointed for the congressional district in which is located the employment bureau or branch at which the claim was originally filed, or, at the discretion of the chairman, by such other commissioner as may be designated by the chairman, except that, at the discretion of the commissioner in whose congressional district the appeal is to be heard, and with the approval of the chairman of the unemployment commission, two additional members of the commission or additional commissioners, as designated by the chairman, may sit at such hearing and a majority of said three commissioners shall decide such appeal. No commissioner shall hear an appeal if he has a direct or indirect interest in the business of any party to the proceeding."

Conn. Gen. Stat. §31-243. "Continuous jurisdiction.

Jurisdiction over benefits shall be continuous but the initiating of a valid appeal under Section 23 of this act or the pendency of valid appellate proceedings under Section 26 of this act shall, if the appellate tribunal has taken jurisdiction, stay any proceeding hereunder, but only in respect to the same period and the same parties,

but shall not cause the cessation of payment of benefits as provided by section 31-242. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the administrator, or the examiner designated by him, may, at any time within six months after the date of the original decision, or within such other time limits as may be applicable under section 31-273, review an award of benefits or the denial of a claim therefor, in accordance with the procedure prescribed in respect to claims, and may issue a new decision, which may award, terminate, continue, increase or decrease such benefits. Such new decision shall be appealable under the provisions of section 31-242. Within the time prescribed in section 31-241, and where the claimant has been free from fault, a redetermination or new decision shall not effect benefits paid under a prior order.

Conn. Gen. Stat. §31-274. "Saving Clause.

" . . . (c) The provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases . . . . "

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LARRY STEINBERG, *et al.*
Plaintiffs

vs.

JACK A FUSARI, *Commissioner of Labor*, The Administrator, Unemployment Compensation Act, State of Connecticut
Defendant

Civil Action No. 15,104

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Jack A. Fusari, Commissioner of Labor, The Administrator, Unemployment Compensation Act, State of Connecticut, defendant above named, hereby appeals to the Supreme Court of the United States from the Judgment finding that the defendant's "seated interview" system as currently used for terminating or suspending the payment of Unemployment Compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution, and from the Injunction issued on September 17, 1973, filed on September 25, 1973, whereby the defendant and his successors in office, agents, and employees are enjoined from administering Chapter 567, Connecticut General Statutes (Section 31-222 *et seq.)* in such a manner as to deprive members of the plaintiff class of Unemployment Compensation benefits without first according them a constitutionally sufficient prior hearing.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk is requested to prepare a transcript of the entire record in this cause for certification and transmission to the Clerk of the Supreme Court of the United States.

Dated: October 5, 1973.

ROBERT K. KILLIAN
Attorney General of the State of Connecticut

DONALD E. WASIK
Assistant Attorney General

Defendant's Attorneys
Employment Security Division
Labor Department (AG-7)
Hartford, Connecticut 06115
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AFFIDAVIT OF PROOF OF SERVICE

I, DONALD E. WASIK, being first duly sworn, depose and say that I am an Assistant Attorney General for the State of Connecticut and the attorney for the defendant in the above entitled case, and I hereby certify that on the 5th day of October, 1973, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows:

On the plaintiffs, Larry Steinberg, Cecil Paskewitz, Delia Triana and Juan Miranda by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record as follows:

To Raymond J. Kelly, Esq., Tolland-Windham Legal Assistance Program, 756 Main Street, Willimantic, Connecticut and

To John Creane, Esq., 555 Naugatuck Avenue, Milford, Connecticut, attorneys for all plaintiffs including class plaintiffs.

Donald E. Wasik

Attorney for the Defendant

Subscribed and sworn to before me this 5th day of October, 1973.

Robert M. Murphy

Commissioner of the Superior Court

FILED
Oct 8, 8:34 AM, '73
U.S. DISTRICT COURT
NEW HAVEN, CONN.